FILED

00-278 MAY 30 2000

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

JANET CHANG,

Petitioner,

-against-

FIRST AMERICAN TITLE INSURANCE CO. OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF STATE OF NEW YORK APPELLATE DIVISION, SECOND DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

JANET CHANG
Petitioner Pro Se
947 Fox Meadow Road
Yorktown, NY 10598
(914) 245-9690

(8716 – 2000)

Printed on Recycled Paper

4 copies

QUESTIONS PRESENTED

1. Does "Equal Protection" apply equally to "all" citizens - poor, rich, plaintiff, defendant, all tenant-in-common, etc., besides the named "suspect" classes, (e.g. race, color, etc.)? Does the court have the duty not to aid the aggression of the rich and powerful against the little people? Whom can the little people rely on for protection of his/her property, right to contract and the right to pursuit happiness, if not the court?

2. In making decision to grant subrogation right, is it equitable and against public policy for a court to disregard a service provider's inequitable conduct, should the court consider granting such a right under the rules governing the claimant's role as a service provider? Does the right of equal protection entitles the defendant to a counter-claim against the claimant's inequitable interference into the defendant's property and contract right?. Is it in the public interest to condemn all inequitable conduct and prohibit a wrongdoer from making a large profit from its own wrong - so as to deter future delinquency?

LIST OF PARTIES

(a) Parties appear in the caption of the case on the cover page:

1. First American Title insurance Co. of New York - substituted as plaintiff

2. Janet Chang - defendant

(b) Parties not listed in the caption of the case on the cover page, but are parties to the proceeding in the court whose judgement is the subject of this petition:

1. Great Eastern Bank of Flushing - the original plaintiff (mortgagee) who was replaced by First American Title Insurance Co. of New York (delinquent title insurer - remaining sole plaintiff)

2. Steven Chang - the defaulted borrower (mortgagor) who did not make appearance in the proceedings

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CITED AUTHORITIES iv

TABLE OF APPENDICES x

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF FACTS 3

REASONS FOR GRANTING THE WRIT 8

I. VIOLATION OF FOURTEENTH AMENDMENT 10

II. CONFLICT OF OPINIONS; DISPARATE RESULTS 18

CONCLUSION 28

TABLE OF CITED AUTHORITIES

CASES:

Adams v Allen, 19 So. 2d 578 27

Alston v Durant, 2 Strobh., 257 23

American Title Insurance Co. v M-H Enterprises, 815 P.2d 1219 27

Application of Brooklyn Trust Co., Appeal of Oelbaum, 12 NYS2d 718 23

Armstrong v Manzo, 380 U.S. 545 11

Baldwin Bellmore Fed. Sav. & Loan Ass'n v Stellato, 287 NYS2d 516 11

Barrett v Jacobs, 255 NY 520 12

Bell v Greenwood, 242 NYS 149 23

Boddie v Connecticut, 91 S. Ct. 780 11

Brandner v Traveller Ins. Co., 587 P. 2d 933, 1978 25

Bridges v State of Calif., 62 S. Ct. 190 13

Brunagin v Tillinghast, 18 Cal 265 18

Carl Peterson Co. v Zero Estates, 261 NW 2d 346 19

Chelsea Exchange Bank v Weinstein, 226 AD 601, 236 NYS 185 19

Chrysler First Fin. v Chicago Title Ins., 595 NYS2d 302 25

City of Buffalo v Hawks, 236 NYS 89 11

Cochran v Kansas, 316 U.S. 255 17

Concord Union Mut. v Woodbury, 45 Me 447 27

Coy v Raabe, 418 P.2d 728 19

Empire Dev. Co. v Title Guar. & Trust Co., 225 NY 53 25

Estave v Abad, 68 NYS2d 322 12

First American Title Insurance v Kevlin, 610 NYS 2d 361 ..... 13, 14

First Nat's Bank v Morgan, 112 NW 2d 26 13

Foshee v Lloyd's New York, 619 F2d 1104 26

Germania Life Ins. Co. v Potter, 109 NYS 435 11

Greenfield v Denner, 6 AD2d 263, 175 NYS2d 918) 22

Griffin v Illinois, 76 C. Ct. 585 ..... 8, 9

Gonzales v Reichthaler, 233 NY 607 15

Guard-life v Parker Hardware, 428 NYS2d 628 16

Hamilton Fire Ins. Co. v Greger 246 NY 162, 158 NE 60 24

Harlem Sav. Bank v Cooper, 101 NYS2d 641 11

Hartford Fire v Bleedorn, 132 S.W. 2d 1066 27

Herbil Holding v Com. Land Tit. Ins. Co., 590 NYS2d 512 25

Hessian Hills Country Club v Home Ins. Co., 262 NY 189 26

Holden v Hardy, 18 S. Ct. at 387 11

In Re SPG of Schenectady, Inc., 833 F. 2d 413 26

Inves v South B. R. Co., 201 NY 271 11

Janke v Janke, 366 NYS2d 910, aff'd 39 NY2d 786 23

Jaymax Precision Products, Inc. v Ship Tank Service Marine Corp., 165 NYS2d 133 13

Jensen v Associates Discount Corp., 126 NYS2d 263 ... 21

Kernochan v N.Y. Bowery Ins. Co., 17 NY 436 26

King v Pelkorski, 20 NY2d 326 18

King v the State Mutual Fire Insurance Co. 7 Cush. 25

Knowlton v Black, 1907, 102 Me 503, 67 A. 563 27

Laura Holiday Co. v Smith Barney, 88 NY 2d 413 15

Lawyers Title Ins. Corp. v Research Loan & Inv. Corp., 361 F2d 764 25

Leyden v Lawrence, 81 A. 121 27

Mays v Cincinnati, 1 OHIO St. 268 18

Mayor, etc., v Lefferman, 4 Gill 425 18

McGrath v Hilding, 394 NYS2d 603 22

McFarland v Amer. Broadcast. Co., 623 F. Supp. 1334 8

Merten v Wakefield, 71 NYS 1062, 35 Misc 501 27

MLB v SLJ, 117 S. Ct, 555 ..... 8, 9

Money Store/Empire State v Lenke, 542 NYS2d 174 14

Montgomery v Daniels, 378 NYS2d 1 11

Norwich Fire Ins. Co. v Boomer, 4 Am. rep. 618 27

Nassau Trust Co. v Montrose Concrete Prod. Corp., 451 NYS 2d 663 22

NBT Bancorp v Fleet/Northern Star Fin. Group, 641 NYS 2d 581 15

New York Committee Against Discrimination v Pelham Hall Apt., 170 NYS2d 750 10

NLRB v Jones & Laughlin Steel Corp., 301 U.S. 1 10

Palisano v Banbkers & Shippers Ins. Co. 84 NYS2d 637, aff'd 95 NYS2d 543 26

Pheonix Assur. Co. v Allison, 17 S.W. 894 27

People by Van Scharck v Title & Mortgage Guar. Co., 264 NY 69 11

People v Dugan, 82 NE 2d 482 9

Pittsburgh-Westmoreland Coal Co. v. Kerr, 220 N. Y. 137 23

Powell v Alabama, 287 U. S. at 69 17

Puget Sound Nat. Bank v McMahahon, 330 P.2d 559 20

Schmidt v Langield, 169 NE 2d 229 20

Schwab v Krauss, 566 NYS 2d 974 14

Sinclair v Purdy, 235 NY 245 23

Taylor v Porter, 4 Hill 140 10

Universal Title Ins. Co. v U.S., 942 F. 2d 1311 19

V. R. W. Inc. v Klein, 68 N.Y. 2d 569 14

Williams v Bright, 632 NYS2d 760 10

Woods v Lancet, 303 NY 349, 355 8

Yick Wo v Hopkins, 118 U. S. 356 16

CONSTITUTIONAL AND STATUTORY PROVISION

1. U.S. Constitution, Fourteenth Amendment, Sec. 1 .. 1,5,9

2. New York State CPLR Article 32, R. 3212(B) 2, 12

3. N. Y. State Insurance Law Sect. 1113[a][18] 2, 24

4. N.Y. State SCPA Sec. 1903(3) 3, 22

OTHER AUTHORITIES:

Restatement, Restitution Sec. 112 22

Restatement, Restitution Sec. 162, Comment (b) 24

Restatement, Torts, Sec. 766 & 766A 16

Archbald Cox, "Court and Constitution" 9

Pollack, "Principle of Contract" 523 23

INDEX TO APPENDICES

APPENDIX A: COURT OF APPEALS ORDER DENYING MOTION FOR REHEARING AND FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS 1a

APPENDIX B: COURT OF APPEALS ORDER DENYING MOTION FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS 2a

APPENDIX C: N.Y. STATE SUPREME COURT, APPELLATE DIVISION, SECOND DEPT., DISMISSING THE APPEAL AND DENYING REVIEW OF LOWER COURT FINAL JUDGEMENT OF FORECLOSURE AND SALE 3a

APPENDIX D: N.Y. STATE SUPREME COURT, QUEENS COUNTY FINAL JUDGEMENT OF FORECLOSURE AND SALE 5a

Janet Chang, defendant and a pro se lay litigant respectfully petitions for a writ of certiorari to review the judgement below.

OPINIONS BELOW

The opinion of the N. Y. State Supreme Court, Appellate Division, Second Dept., appears at Appendix C to the petition and it is not published. It was a dismissal without review of an appeal and issued no opinion on the district court's opinion. The district court's opinion appears at Appendix D.

The Court of Appeals of State of New York denied permission to appeal to that court and denied a motion for rehearing. The orders appear at Appendix A and B.

STATEMENT OF JURISDICTION

This court has jurisdiction to consider this petition by way of Writ of Certiorari, and to decide this matter, pursuant to 28 U.S.C. Sec. 1257(a).

The date on which the N. Y. State Court of Appeals denied motion for permission to appeal was Dec. 20, 1999. A copy of that decision appears at Appendix B.

A timely petition to the Court of Appeals for rehearing was thereafter denied on Feb. 29, 2000. A copy of the order denying rehearing appears at Appendix A.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

1. U.S. Constitution, Fourteenth Amendment, Sec. 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty without the due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

2. New York State CPLR Article 32, R. 3212, On Summary Judgement:

(b) Supporting proof; grounds; relief to either party. A motion for summary judgement shall be supported by affidavit, by a copy of the pleading and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts, it shall recite all the material facts, and shall show that there is no defense to the cause of action or defense has no merits. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgement in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgement, the court may grant such judgement without the necessity of a cross-motion.

* [Subd(c): Immediate trial]

3. N. Y. State Insurance Law Sect. 1113[a][18]: Title insurance means insuring owners of and other persons fully interested in, real property and chattels real against loss by reason of defective titles and encumbrances and insuring the correctness of searches for all instruments, lien or charges affecting the title to such property, including power to procure and finish information relative thereto, and such other incidental powers as and specially granted in this chapter.

4. N.Y. State SCPA Sec. 1903, Limitations

(3) A proceeding under this article to satisfy a legacy expressly or impliedly charged on the real property must be instituted within 10 years from the date of death of the decedent.

STATEMENT OF THE CASE

This appeal is not only to seek amelioration from the result of a miscarriage of justice, it is also to illustrate how a rich title insurer can hire a high-priced specialist to take advantage of the ambiguity in title insurance law and procedural complexity to defeat a "little people" who could not afford to pay lawyer. First American Title Insurance Co. of New York profited by over $180,000 from its erroneous certification that Steven Chang (one of two owners under tenant-in-common) was a sole owner; Great Eastern Bank, negligently relying on it, paid off the two-owners' purchase money mortgage of $85,000 and granted an imprudent loan of $250,000 to Steven Chang - with actual notice from the title search report that he was not the sole owner. The bank incurred a large loss when Steven defaulted. Title insurer settled with the bank in the amount of $195,000, went on to collect the bank's entire claim of $386,246; while the non-participating co-owner's widow (who expressly objected to any refinancing or interference into her mortgage contract) lost her property without adequate compensation. Her property and contractual rights had in effect not received the equal protection of the law.

The forfeiture of the defendant's right to be vindicated in a State appellate court is a display of a different kind of inequality - that all the so-called "mistake" by bank and title insurer (which is actually a breach of legal duty), or error in a judgment were excused; yet a *pro se* lay defendant's inadvertent mistake of missing a deadline by 7 days (because of a serious car accident) was not forgiven. I hope the Court will find in a review of this case, the issues, plaintiff's manipulation and my hardship some

insight for progress in democratic endeavor to protect the "little people" so that they could safely hold on to whatever little possessions they have; it will also prevent future miscarriage of justice and protect the integrity of the court.

The subject property was purchased under the names of petitioner's late husband Hsu Chang and his youngest brother Steven, having a mortgage of $90,000 with Long Island Savings Bank (hereafter as LISB). After Hsu died, without my knowledge and consent Steven took a $250,000 loan from Great Eastern Bank (hereafter as GEB) who placed a mortgage encumbering the entire property. As a condition for giving the loan, GEB issued a bank check and required Steven to pay off a $85,138 balance of LISB mortgage. As I had written 2 letters to LISB objecting to refinancing, LISB refused to give assignment of the mortgage and allowed GEB to discharge and extinguish its mortgage. As soon as I found out, I directed the attention of GEB and First American Title Insurance Co. of New York (hereafter as FATIC) to the impropriety of their action. GEB declared in a letter [R 227] that if any loss arisen from the mortgage, it would be for the title insurer to indemnify it as it relied on the title insurer's certification that Steven was the sole owner, and the insurer had omitted all exceptions related to Hsu's Estate. FATIC stated that it was a matter between itself and its insured. [R 226]. Among pages of closing documents was a showing [R 211] of FATIC agent's omitting the exceptions requiring proof from Hsu Chang's family showing death intestate, and waived claim for the lien of debt against Hsu Chang's estate. GEB & FATIC's words and conduct led me to take no action, I trusted that a claim for the lien was expressly waived and estopped them from making it in the future.

When Steven defaulted, the FATIC retained its long time defender Dollinger, Gonski & Grossman (as Grossman) to foreclose on behalf of GEB on Steven and me. Steven did not appear. GEB's motion for Summary Judgement was granted on

the ground that GEB had paid my LISB debt by mistake and I was unjustly enriched, in spite that my lawyer's answer and opposition offered defenses and counter-claim [R 81] together with many documents as supporting evidence, which included, among other things, that (a) I did not know or approve Steven and GEB's action; (b) I had earlier written letters to LISB to prevent the LISB mortgage to be refinanced away (I need the integrity and privilege of that mortgage to protect my property); (c) the title search report and closing documents all indicated that GEB knew or should know of my rights and objection, GEB relinquished an assignment of mortgage and waived the claim against Hsu Chang estate at the closing; (d) GEB wrote to N. Y. Banking Dept. that it relied on FATIC's certification that Steven Chang was the sole owner, any loss arisen from title defect it would look to its title insurer for indemnification, and FATIC declared the mortgage was a matter between itself and the insured. These showing should be sufficient to preclude summary judgement.

With knowledge of my rights and my opposition, a discharge of my mortgage was an voluntary payment and interference into my protected contract right under 14th Amendment of Constitution. Yet the court ordered: (i) that the answer, affirmative defense and counter claim asserted by the defendant Janet Chang be stricken; (ii) that the interests in the subject owned by mortgagors Steven H. Chang and Janet Chang shall contribute equally to the repayment of the equitable first mortgage lien in the sum of $85,138.30 which the plaintiff Great Eastern Bank has heretofore paid to the Long Island Savings Bank; iii) that after payment of the equitable first mortgage lien the monies due and owing by Steven Chang to Great Eastern Bank on the second mortgage be paid out of the remainder of Steven H. Chang's interest in the subject property. My lawyer told me that FATIC demanded that I must pay the whole amount of so-called "equitable lien (grown into $200,000 by 1995) for my property interest to be released from being auctioned off.

My lawyer appealed and failed. He resigned shortly after, because I could no longer keep up paying legal fees. He did not oppose FATIC's substitution as plaintiff nor its subrogation to claim the full amount of GEB's loss. Fearfully I struggle on my own to continue. Old age, stress, a broken right wrist and a growth near the throat, surgeries and slow healing all added to the confusing and hindered the torturous progress in the case.

When I discovered that FATIC had only paid $195,000 - (not the full loss nor the insured amount), I realized the appearing of FATIC into the action as plaintiff exposed itself to a direct assertion of defense against which could eliminate/reduce its claim, also an insurer's subrogation must be determined under the rules governing insurers. I offered new evidence and made new motion requesting the district court to modify the early decision where many issues were not considered, e.g. FATIC did not pay in full; title insurer's subrogation right must pass the test by the rules governing the insurer; FATIC was subjected to assertion of comparative fault, etc. The court did not consider the new issues or FATIC's fault in causing the bank's loss, denied the motion and gave up a chance to hold the true culprit responsible.

The judgement's not fixing a reasonable price for a release of my share of the LISB lien allowed Grossman to insisted that I must pay the entire so-called "equitable lien" (half was Steven's share, it had grown to $225,000 in 1999) to stop the auction off of my interest. As the over-encumbrance of Steven's loan on the entire property (which clouded my title) plus Steven's default and GEB's foreclosure added more force to ravage my credibility and thus precipitated my inability to get bank loan to pay all at once the demanded $225,000. The Referee's computation as drafted by Grossman contained errors including a wrongful calculation of the interest charge. I challenged it but no correction was made, nor did the referee make an effort to investigate the feasibility of selling in parcels (RPAPL Sec.

1321). Value of Steven's half interest was more than sufficient to cover the $195,000 FATIC paid out.

My emergency Order to Show Cause was filed one month before the auction, the court decided on Jan. 5, 1998 (one month after the Dec. 4th auction) showing a recognition of unconsidered issues yet denied modification. Before the Dec. 4, 1998 auction, Grossman rejected my offer of $91,000.00 borrowed funds and a promise to produce in 2 to 3 working days the balance of $210,000 FATIC demanded. My joining in the bidding was cut off by Referee, because my certified check was not made to Referee's name. I was informed recently that my large enough equity in the property should have allowed me to bid much higher without a 10% deposit requirement. The purchaser later said he was prepared to bid much higher, up to $750,000. The property could be sold for much higher than $555,000 which was way below market price.

I did retain a second lawyer right after the auction, unfortunately his past association with the plaintiff-insurer tempered his zest in making good of his promise to me which created a conflict of interest. He spent lots of time coming up with computations to convince me to accept a very low offer. After a first retainer of $5,000 and agreed to charge me monthly, he required a $20,000 additional retainer in March which I could not come up quickly all at once. On April 17, 1999 a serious car accident and injuries (including concussion, neck pain, noise in the ear) added more confusion; I missed the May 4, 1999 deadline for perfecting the appeal to Appellate Div., 2nd Dept. by 7-days, the motion to enlarge time was denied. Ignorant of the consequent and under distress, I made a motion for reargument, the denial of which resulted in Court of Appeals' lack of jurisdiction to review on the ground the order was not a final judgement.

FATIC was not content to merely collecting $373,670.50 from the sales proceeds when it only indemnified GEB with

$195,000. Although the Referee's report indicated zero deficiency, FATIC tried squeezing $12,576.43 from the meager funds in the Receiver's account in a proceeding where I had to face 3 tough lawyers - Grossman, receiver, and the receiver's attorney charging fees to property although an insurer appeared to have been retained the Receiver's lawyer. Whatever little is left for me is subject to tax when I accept it; there would not be enough to buy even a one-bedroom condo in the same area.

REASONS FOR GRANTING THE PETITION

Only a Supreme Court review could provide me a last chance to have a meaningful opportunity to defend myself against the erroneous summary judgement. The Appellate Div. Second Dept. denied reviewing because of a car accident led to my missing the deadline by 7 days. It should be noted here that the Second Dept. has a deadline of only 6 months, 3 months shorter than the 9 months allowed by the First Dept. Court of Appeals too denied review. I have no other remedies. Being forced to continue a litigation which I have had no training, all through the long, hard struggle, I have not given up hope. I have faith in the system which provides a fair review to ameliorate injustice.

"This reexamination of a question where **justice demands it,** is the finest common-law tradition...." (Woods v Lancet, 303 NY 349, 355). The majority in the case of MLB v SLJ, 117 S, Ct, 555, citing Griffin v Illinois 76 C. Ct. 585 to affirm the Court's recognition of the importance of appellate review to a correct adjudication of guilt or innocence; it signified that to deny adequate review to the poor means that many of them may lose their life, liberty or property because unjust convictions which appellate courts would set aside. The lay litigants who are forced (by lack of money) to defend themselves need help. Please take note of the remarks by the court in McFarland v Amer. Broadcast. Co. 623 F. Supp. 1334, "Party's right of self-

representation implies an obligation of court to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training." And "The due process of law which 14th Amendment exact from the State is a concept of fundamental justice and is not satisfied by merely formal procedural correctness" (People v Dugan, 82 NE 2d 482,484). I pray for something to stop the trend of turning a lawsuit into a contest of who could afford a better lawyer. To achieve true equal protection, I plead for the Court to make judgement from what the learned minds could draw from the wealth of their own knowledge, not to base merely on two sides' arguments; especially when a pro se lay defendant had to contend with a high-power lawyer who had superior knowledge in an specialized area of law such as title insurance. The untrained pro se defendant, being forced to defend himself with no proper training or adequate assistance, is lost in the complicated procedural requirements and drowned in the sea of legal theories, cases and books.

Our society is based on democracy, equality and justice for all, not on the bases of survival of strongest, smartest, or the richest, etc. The little people must be allowed to preserve whatever small possessions they have. "There is no justice where the kind of trial a man gets depends on the amount of money he has" (Griffin v Illinois 76 S. Ct. 585; see also MLB v SLJ, 117 S, Ct, 555). We Americans must not encourage or perpetuate such a condition of inequality.

The service of mortgage and title insurance is essential and widespread; mistake in the transaction not only may throw a owner or a borrower into litigation, often result in their losing homes and shelters which are fundamental in people's lives. Little has been written clearly on title insurance which is different from insurance in general as many federal and state courts viewed it as a "warranty". Mr. Archbald Cox remarked in his book "Court and Constitution" that behind the generalities

and abstractions of statues and legal doctrine lie the individual man and woman whose live the law poignantly affects (NLRB v Jones & Laughlin Steel Corp. 301 U.S. 1)." Stated the court in Williams v Bright, 632 NYS2d 760, "By recognize the special condition of one litigant, we may individualize Justice". The knowingly discharging the LISB mortgage would be harmless if Steven and me had same desire for refinancing, or I approved or ratified his action. When the need and goal of the two mortgagors were not the same, it was for the two to work out among themselves. A bank, with knowledge, should not participate in, nor encourage or induce the would-be-borrower's breach of fiduciary duty. A closer look and a clearer and direct ruling on this narrow situation can point the way to resist the distorting effect of generality which the banks, borrowers, title insurers, even the court need to be cautioned of. It could prevent their injurious conduct; or to spare, after a bad transaction occurs, a poor defendant from wasting a lot of time and money for a lawyer to search and to uncover some obscure legal theory since no two identical cases exist; and to prevent making wasteful inappropriate or unhelpful pleading. It could prevent a defendant's running out of money too soon as to become unable to finish a litigation or being forced into an unjust settlement. All the above would be one of the ways to help the poor and uneducated. It makes good sense to save the courts' time and resources by reducing the need for appeals - often brought on by ambiguity and confusion.

POINT I.
VIOLATION OF FOURTEENTH AMENDMENT

'The right of private property is a fundamental, natural, inherent and unalienable right" (New York Committee Against Discrimination v Pelham Hall Apt., 170 NYS2d 750. It was referred to as a "sacred right" in Taylor v Porter, 4 Hill 140. It was said that the law "assures to every person his day in court and an opportunity to be heard and to defend and preserve his

rights by establish any fact which under the law, would be a protection to him or his property" (City of Buffalo v Hawks 236 NYS 89, 93). And "Constitutional liberty implies the absence of arbitrary restrain" (People by Van Scharck v Title & Mortgage Guar. Co. 264 NY 69). "Included within the concept of liberty....to enter into all contracts that may be proper, necessary and essential to carry his purpose to a successful conclusion" (Inves v South B. R. Co. 201 NY 271; Montgomery v Daniels 378 NYS2d 1).

"Foreclosure is the judaical act invoked by one party to compel the other party to fulfill his mortgage agreement. The judicial act when invoked irrevocably cuts off beyond the possibility of recall the mortgagor's right." (Harlem Sav. Bank v Cooper, 101 NYS2d 641). "The action itself is equitable in its nature, although it is based on legal rights, and it is the province of a court to see to it that a party invoking its aid shall have dealt fairly before relief is given". (Germania Life Ins. Co. v Potter, 109 NYS 435; Baldwin Bellmore Fed. Sav. & Loan Ass'n v Stellato 287 NYS2d 516). A financially handicapped person runs more risk in being victimized, yet has less ability to defend his property and contractual rights. There is need for more effective measure to insure better protection.

THE DEFENDANT WAS DEPRIVED OF A FULL, FAIR AND MEANINGFUL OPPORTUNITY TO DEFEND ONE'S RIGHT

In Boddie v Connecticut, 91 S. Ct. 780, the court stated that persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. The hearing must be a meaningful time in a meaningful manner (Armstrong v Manzo 380 U.S. 545). "Due process of law implies a conformity with natural and inherent principle of justice" (Holden v Hardy 18 S. Ct. at 387). No amount of procedure or technical correctness can justify unjust result.

The order [R 4] granted GEB the foreclosure right was arrived without a trial, although triable issues were raised. New evidences was offered and new issues raised in new motion request modifying the early summary judgement after the delinquent title insurer became the sole plaintiff. Yet no modification was made in the final judgement [R 336]. This petition to the highest Court in the land is made with a hope that the Court will review and ameliorate an unjust result which is repugnant to the Constitution as there were no meaningful investigate, trial or review to determine whether GEB had dealt fairly with the defendants; and FATIC should not be allowed automatically to be subrogated to foreclosure right without the test by the rules which insurers must follow, especially when GEB's loss could be said to be directly caused by FATIC's wrong.

Under CPLR 3212, motion for Summary Judgement is to be denied if any party shall show facts sufficient to require a **trial** of any issue of fact. There were two claims against two defendants under different cause of action. Steven did not appear to dispute the claim against him. But my lawyer raised triable issues e.g. GEB's knowingly intruded into my mortgage, voluntarily paid my debt; he made a good showing of many documents to dispute GEB's claim against me. The GEB did not refute, it only made a conclusory statement (no proof or explanation) that it was a mistake. Summary judgement is a drastic decision,

> "Issue finding, rather than issue determination, is the key to the procedure...." (Estave v Abad 68 NYS2d 322).

> "If the judge has any substantial doubt as to what a given material fact is, or can reasonably conclude that the fact is "arguable", the motion must be denied." Barrett v Jacobs 255 NY 520)

"Defenses warranting **trial** where defendant had show bona fide defense of substantial character sufficient to entitle it to trial of issues, it was error to grant summary judgement" (Jaymax Precision Products, Inc. v Ship Tank Service Marine Corp. 165 NYS2d 133).

"The word **trial** connotes decisions on the evidence and argument properly advanced in open court (Bridges v State of Calif., 62 S. Ct. 190, 197).

In contrast to our case, the court in First American Title Insurance v Kevlin 610 NYS 2d 361 (A.D. 3 Dept.) denied summary judgement against both cotenant indiscriminately; and the Appellate Div., Third Dept. granted summary judgement against the borrower alone, in recognition of the separate rights of 2 cotenant with disparate interests and to treat them equally.

INDIVIDUAL RIGHTS ENTITLED TO PROTECTION BY CONSTITUTION

The plaintiff's complaint claimed that I, "Janet Chang" defaulted on its mortgage when I took no part in the transaction. Steven could have taken a smaller second mortgage in keeping with his equity interest so as not to injure my right. The bank must not participate in or encourage Steven's breach of fiduciary duty. Two owners as tenant-in-common, if one oppose or did not approve the other's action, the wrong of the other party should not be a cause to destroyed the non-consenting owner's right.

"A tenant-in-common who does nothing to mislead a third person, or whose conduct is such as to warrant a 3rd persons reliance thereon, is not bound by the unauthorized acts of his co-tenant." (First Nat's Bank v Morgan 112 NW 2d 26.)

The court in First American Title Insurance v Kevlin 610 NYS 2d 361 (A.D. 3 Dept.) had no difficult to recognize that the lender and subsequent substituting plaintiff FATIC (the same title insurer in our case) both having no foreclosing rights against the owner who took no part in the mortgage. In denying Household Finance's motion for summary judgement to foreclose against both owners, the court forced the plaintiff to request an order severing its claim against the non-consenting cotenant. The Appellate Div. 3rd Dept. modified the order to grant a summary judgement against the borrower alone, the title insurer inherited only the right to foreclose on the borrower and receive an undivided interest. The court, citing V.R. W. Inc. v Klein, 68 N.Y. 2d 569; Schwab v Krauss 566 NYS 2d 974; Money Store/Empire State v Lenke 542 NYS2d 174, stated:

> "a conveyance by one tenant, to which the other has not consented, cannot bind the entire fee or impair the non-consenting tenant's interest, and the foreclosing mortgagee acquire only an **undivided interest** held by the borrower. (V.R.W. Inc. v Klein, Supra, 68 N.Y. 2d at 564).... Accordingly, upon the severance of this action, the foreclosing mortgagee would only acquire that interest held by Joseph Kevlin."

By comparing the two cases both involving the same title insurer FATIC, we see that a just result can only be reached when the court (and the mortgagee) recognizing a non-consenting owner's individual right and extends equal protection to that right, and to prohibit a mortgagee's claim against one cotenant's wrong to reach over and destroy the rights and privilege of the other.

INTERFERENCE OF EXISTING CONTRACTUAL RIGHT

GEB's officious discharge of my mortgage was an infringement of my freedom - to hold on to my existing contract

necessary to carry out my purpose of owning a property; and GEB's foreclose without my having a full and meaning opportunity to defend was a deprivation of my private property and contractual right without due process of law.

The elements required for recovery for interference of existing contract right (as cataloged in Laura Holiday Co. v Smith Barney, 88 NY 2d 413), were all present in this case.

1. A valid contract with a third party existed, LISB mortgage;

2. GEB had knowledge of the existence;

3. GEB's intentionally (with knowledge as well as an self-interest to become a first mortgagee) procurement of a breach is sufficient to impose liability when it led to

4. the actual breach of the contract;

5. which resulted in abridgement of my privilege (being allowed to perform my duty and achieve my goal in installment payments), waste of money in litigation, time and pain and loss of property. **If were not for GEB's interference** into my mortgage contract, I would be able to pay off my mortgage debt in small monthly installment, living in one unit and renting out another and owning free and clear by 2009 an half interest (2 units) of a most desirable and valuable property perhaps doubling in price the 1999 knocked-down auction price with 10 years rent free living.

In NBT Bancorp v Fleet/Northern Star Fin. Group, 641 NYS 2d 581, Chief Justice Judith Kay ruled that with respect to contract for a definite term, persuasion to breach alone as by an offer of a better term, has been sufficient to impose liability (Gonzales v Reichthaler, 233 NY 607). Recovering damage for tortious interference with contractual right would be permitted

even if the party interfered was engaged in lawful behavior. She Quoted Guard-life v Parker Hardware 428 NYS2d 628 which stated "Generalization must be refused in this context to achieve a balancing of the protection of interest of one party's enjoyment of contractual performance and society's interest in respect for the integrity of contractual relationships.... Respect for individual contract rights outweighs the public benefit to be derived from unfettered competition."

GEB's self serving discharging of my debt over my objection makes GEB liable for my loss.

> "One who intentionally and improperly interferes with the performance of a contract. . . between another and a third person by inducing or otherwise causing the third person not to perform the contract or by preventing the other from performing the contract or causing his performance to be more expensive or burdensome is subject to liability to the other for the loss resulting from [his acts]." (Restatement, Torts, Sec. 766 & 766A)

THE ELUSIVE EQUAL PROTECTION

In Yick Wo v Hopkins, 118 U. S. 356 the Supreme Court stated "equal protection and security should be given to all underline circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursuit their happiness and acquire and enjoy property". In a democracy, the courts are the ultimate refugee for the citizens for vindication of their rights and liberty. Denying of my right to a full and meaningful opportunity to defend and to have a review to correct an erroneous ruling is the equivalent of deprivation of my fundamental right. To offer some assistance to a defendant who could not afford counsel was merely to give substance to a constitutional promise of equal protection, it is not giving away something which the defendant does not already have. In

Cochran v Kansas, 316 U.S. 255. It was held that a State which permitted an appeal in that type of case could not withheld it from one still comport with the standards of equal protection. The principle of equality should applied to all accused, whether it be in criminal or civil case. Substantial due process refers to a set of rights considered fundamental, even though they are not explicitly articulated in the bill of rights. This concept applies to the cutting off of my right to a review of the district court's erroneous judgement. Justice Sutherland "Even the intelligent and educated lay man has small and sometimes no skill in the science of law.... He is unfamiliar with rules.... He lacks both the skill and knowledge to prepare his defense even though he have a perfect one. He needs the guiding hand of counsel at every step in the proceeding against him because he does not know how to establish his innocence. (Powell v Alabama 287 U. S. at 69)

Aid to Criminal defendant who could not afford to pay lawyer had came about through advocacy and a proven need. The lack of aid for poor defendant in civil case has equally ruinous effect in its distorting a judicial decree and impairing the defendant's right in a deadly foreclosure case. The framers of Constitution placed no limitation on the types of people entitled to equal protection. The list of named suspect classes has expanded over the years, often precipitated by a heroic decision from this Court; it has not embraced wholly the group of poor. Many from this group could never reach the court. Their protection depends more on the good faith and good behavior of those with whom they have to become involved. The only effective protection for the vulnerable and unsuspecting poor is the deterrent effect of the court decision and the inhibitive power of penalty which will be most efficient in diminishing offender's errors and omissions.

POINT II.
THE CONFLICT OF DECISIONS; DISPARATE RESULTS

GEB'S DISCHARGE OF THE LISB MORTGAGE WAS OFFICIOUS, NOT BY MISTAKE NOR UNJUSTLY ENRICHED ME; IT INTERFERED WITH MY EXISTING CONTRACTUAL RIGHT AND DESTROYED MY PRIVILEGES

The LISB mortgage was not in default, nor matured, there was no threat or compulsion. GEB had no interest to protect prior to its officious interference, GEB's payment was voluntarily.

> "A payment is not to be regarded as compulsory unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid" (Mayor, etc., v Lefferman, 4 Gill 425, Brunagin v Tillinghast, 18 Cal 265; Mays v Cincinnati, 1 OHIO St. 268.)

King v Pelkorski, 20 NY2d 326 which plaintiff relied on is not controlling. Mrs. King, an unsophisticated individual, made a simple mistake in giving a loan to Joseph Pelkorski who had no right to mortgage a Trust interest of his wife; Mrs. King was truly ignorant of the intervening lien. The creditor's money was used to pay off debts on the jointly owned business, which was under threat. Mrs. Pelkorski's acquiescence in the mortgage placed by Mrs. King amounted to ratification. The creditor was not promptly informed, given a chance to rescind the contract as GEB was. As Mrs. King's mortgage was invalid for security, the court had to allow her the only available remedy - creating an equitable lien basing on mistake.

In our case, the greatest difference is that LISB mortgage was not an intervening lien nor was it unknown, in default or had matured (there was no threat); my share was a protected right

immune to any outside force's interference. I did not ratify GEB's paying it off. Only a very small part of the borrowed money was used to pay it.The GEB mortgage was valid against Steven's interest; the bank had also a claim against FATIC for an insured title defect. GEB and FATIC were professionals; and "A mortgagee takes with actual notice of an agreement shown on a title company report submitted to the mortgagee's attorney" (Warren Reed New York Real Property, Notice, Sec. 3.05: also Chelsea Exchange Bank v Weinstein, 226 AD 601, 236 NYS 185). GEB could not claim to be a bona fide purchaser without notice, the payment was not a simple mistake.

In Universal Title Ins. Co. v U.S., 942 F. 2d 1311, the court clarified the criteria for determine whether a mistake is 'excusable' for purpose of the doctrine of legal subrogation. Bank and title insurer both were said to be "professional enterprises experienced in the area of secured transaction involving real property", they must be held to a higher standard. Referring to Carl Peterson Co. v Zero Estates, 261 NW 2d 346, 348), the court stated,

> "Unlike the unsophisticated individual wholly unaware of a judgement lien. The bank is a professional lender with knowledge ....consistent with other jurisdictions, which have imposed stricter standards on professionals in context similar to the instant case. For example, the Washington Supreme Court distinguish between purchasers of real estate and a title insurer, noting that the former are bona fide purchasers to the extent that they were entitled to rely upon others who were paid to give an expert opinion and insure title. **The latter are engaged in giving those expert opinions for a consideration**. In equity, the purchasers and the title insurer are poles apart. (Coy v Raabe 418 P.2d 728.) .... It would be a gross misapplication of the doctrine of subrogation were we to hold that its cloak settles automatically upon one who has simply made a mistake, when it is a commercial transaction

> involving consideration. [The title insurer's] relationship is governed by the law of contracts. Further, **it is difficult to think of a situation in which a title insurance company could not claim unjust enrichment as to someone who might inadvertently benefit by their negligence.** Either they insure or they don't. It is not the province of the court to relieve a title insurance company of its contractual obligation. [The insurer] has not cited us authority to the contrary."

GEB claimed in its Verified Complaint, ".... defendant Steven H. Chang, represented that he was sole owner of the subject premises at the time of the closing.... Plaintiff GREAT EASTERN BANK, would not have loaned the sum of $250,000 to defendant STEVEN H. CHANG, if it had known that said defendant was only the owner of a one-half interest in the subject premises." A bank is grossly negligent if it gives out $250,000 based merely on the say-so of the would-be-borrower. Putting the blame on Steven and me was obviously an afterthought and resorted to by Grossman; as 4 years earlier GEB had stated in a letter dated June 20, 1988 [R 227] to the N. Y. Banking Dept.,

> "Based upon the representation of the title company, Great Eastern Bank placed a mortgage in the amount of $250,000 on the entire property with Steven as the Mortgagor. If there is a title problem concerning the real property, it is the title company's responsibility."

GEB did not trust Steven, it had engaged FATIC to search and guarantee the title; it relied on title certification and the insurance. "One who has acquired expert knowledge concerning the matter dealt with may be required to form his own judgement, rather than take the word of defendant (Puget Sound Nat. Bank v McMahahon 330 P.2d 559; Schmidt v Langield 169 NE 2d 229).

As I objected to refinancing of LISB loan [R 196, 197]; LISB duly complied with my request and refused to assign the mortgage to GEB [R 254], merely allow GEB to discharge it for the GEB's self-serving purpose. It is inferable from GEB & FATIC's words and actions that GEB's discharge of LISB mortgage was made with such understanding, and GEB also accepted that Steven was to be wholly responsible. At the closing, FATIC's agent marked "omit" to all exceptions pertaining to Hsu Chang [R 211], e.g.

> '**Omit**' Exception No. 14, "Proof showing date and place of death and heirship of HSU CHANG is required to be established by death certificate and affidavit from a member of decedent's family showing death intestate, without leaving a will, and setting forth complete family history and descent satisfactory to this company and containing an heirship clause."
>
> '**Omit**' Exception No. 15, "Except the lien of debts against the estate of Hsu Chang, deceased".

Later, after I discovered that my rights were infringed upon, I called GEB's attention to their misconduct. At the time I was supporting 3 children on a $13,000 annual salary of a entry level secretary, paying lawyer was out of the question. So I requested the intervention by N. Y. Banking Dept. GEB waived its right to claim again by letter dated June 20, 1988. [R 227]

> "Where the conduct of the payor, after discovering the mistake, amounts to ratification of the payment, or is inconsistent with its claim of right to recovery, there can be no recovery." (Jensen v Associates Discount Corp., 126 NYS2d 263, cited 70 CJS Sec. 157(a))
>
> "He who having knowledge of rights which he may assert, has failed to act, with the result that another has acted upon

the assumption that such rights do not exist or are not to be asserted, is estopped to assert them." (Greenfield v Denner, 6 AD2d 263, 175 NYS2d 918),

"Estoppel rests upon word or deed of one party upon which another rightfully relies and so relying changes his position to his injury" (Nassau Trust Co. v Montrose Concrete Products Corp. 451 NYS 2d 663).

Furthermore, SCPA Sec. 1903 stipulates that a proceeding to satisfy a legacy charged on particular real property must be brought within ten years of death. (See also Pedowitz' "Real Property Title" Sec. 5-57 stated). GEB waited more than 10 years to file foreclosure action to claim against Hsu Chang's estate.

I never received a penny from Steve or the property, nor had I one day's use of it; it is not unfair to make Steven pay for the LISB debt. Also I have not been unjustly enrichment because,

"Where a person officiously conferred a benefit upon another, the other is enriched, but is not considered to be unjustly enriched. The rule denying restitution to officious person has the effect of penalizing those who thrust benefits upon others and protecting persons who have had benefits thrust upon them (See Restatement, Restitution Sec. 112) .... in accordance of the principle that compensation for benefits conferred is denied to officious intermeddler or to persons who manifest no desire to have compensation." (Restatement, Restitution Sec. 2)

As stated in McGrath v Hilding 394 NYS2d 603,

"Enrichment alone will not suffice to invoke the remedial powers of a court of equity. .... Whether there is unjust enrichment may not be determined from a limited inquiry confined to an isolated transaction. It must be a realistic

determination based on a broad view of the human setting involved. (cf. Sinclair v Purdy, 235 NY 245; Janke v Janke, 366 NYS2d 910, aff'd 39 NY2d 786).... without regard to the plaintiff's conduct it cannot be determined whether Hilding's enrichment, if that it be, was in fact **unjust**.... The point is that no intelligent determination can be made unless all of the relevant facts are explored. Then, upon such exploration, a nice balance is required. None of that happened or was permitted to happen in this case."

GEB HAD NO RIGHT OF SUBROGATION AGAINST ME

In Application of Brooklyn Trust Co., Appeal of Oelbaum, 12 NYS2d 718, the court stated "Subrogation is never permitted where its application will work injustice." (Pittsburgh-Westmoreland Coal Co. v. Kerr, 220 N. Y. 137, 115 N.E. 465; Bell v Greenwood, 242 NYS 149); nor permitted when the payment is voluntarily made after a conscious deliberation and under no compulsion or threat.

'"The common principle is that if a man chooses to give away his money or to take his chances, whether he is giving it away or not, he cannot afterwards change his mind, but it is open to him to show that he supposed the facts to be otherwise, or that he really had no choice.' Add Cont. 1043; Alston V Durant, 2 Strobh. 257". (Swift & Courtney & Beecher Co. V U.S., citing Pollack, Principle of Contract, 523)

'The doctrine of subrogation is a pure, unmixed equity, having its foundation in the principles of natural justice, and from its very nature, never could have been intended for the relief or those who were in any condition in which they were at liberty to elect whether they would or would not be bound .... If one, with the perfect knowledge of the facts, will part with his money, or bind himself by his contract in a sufficient

consideration, any rule of law which would restore his money or absolve him from his contract would subvert the rules of social order." (Prairie State National Bank v. U.S. 17 S. Ct. 143; Insurance Co. v Middleport 8 S. Ct. 625, Gladsen v Brown, Speer, Esq. 37, 41)

The circumstances giving rise to denial of subrogation are:

"Where a person discharges an obligation owed by another, or a lien upon the property of another, and do so **officiously,** he is not entitled to reimbursement from the other (See Sec. 2), and is not entitled to be subrogated to the position of the obligee or lien holder. In such a case, it is true that as a result of the payor's act the other is enriched, but the enrichment is not unjust. This is true not only where the person making the payment did so with intention to make a gift to the other, but also where he intended to obtain reimbursement from the other, if the payment was officiously made." (Restatement, Restitution Sec. 162, **Comment (b))**

FATIC'S SUBROGATION RIGHTS MUST BE DECIDED UNDER THE LAW GOVERNING INSURER; DELINQUENT TITLE INSURER SHOULD PAY FOR ITS DELINQUENCY

Title insurance is insuring against loss by reason of defective title (Insurance Law Sect. 1113[a][18]). FATIC's liability to GEB sprang from its own breach of duty as a title insurer.

"In accordance with the general rules in suits involving an insurer's right to recover by reason of subrogation to, or assignment of, the rights of the insured, questions of fact must be submitted to the trier of facts." (Hamilton Fire Ins. Co. v Greger 246 NY 162, 158 NE 60, 55 ALR 921).

"... a defect arising from the rights of a person whose interest **appears in the chain of title** must be covered unless specifically excepted," Chrysler First Fin. v Chicago Title Ins. 595 NYS2d 302 citing Herbil Holding Co. v Commonwealth Land Tit. Ins. Co. 590 NYS2d 512.)

"Usually the very purpose and essence of the title insurance transaction is to obtain a professional title search, opinion and guarantee. The policy of title insurance is in the nature of a **warranty**." (Lawyers Title Ins. Corp. v research Loan & Inv. Corp., 361 F. 2d 764, quoting Empire Dev. Co. v Title Guar. & Trust Co. 225 NY 53). "Here we have held that knowledge is material" (Emp. Dev. Co. v Tit. Guar. & Trust Co., 225 NY 53)

"...the purpose of the **exception** is to protect the title company from having to cover losses...", (Herbil Holding v Com. Land Tit. Ins. Co. 590 NYS2d 512)

By certifying Steven as sole owner, not warning GEB of my rights and not excluding the known lien against Hsu Chang estate, FATIC failed miserably its duty as a title insurer.

"Indemnity and contribution are frequently available to tortfeasor. **Claims to subrogation are seldom**, if at all, **permitted to one whose conduct was tortious**. If any such right allowed would only be to the extent of payment made." (Brandner v Traveller Ins. Co. 587 P. 2d 933, 1978).

BUYER OF INSURANCE POLICY IS ENTITLED TO RELY ON IT GEB MORTGAGE DEBT WAS CANCELED, NO SUBROGATION FOR FATIC.

The court in King v the State Mutual Fire Insurance Co. 7 Cush., made a sound distinction between an insurance purchased **"by"** the mortgagee and **"for"** the mortgagee which

placed an obligation on the insurer to protect the mortgagor when the mortgagor paid for the insurance. Only Where a mortgagee insures solely for his own safety, and entirely at his own cost, the subrogation rights by the insurer may rise. (See also Foshee v Lloyd's New York, 619 F2d 1104).

> "If the insurer by paying the amount of the insurance policy to the mortgagee not only performs a contract with the mortgagee, but also discharges an obligation which it owed to the mortgagor, there is no subrogation right for the insurer. (Palisano v Bankers & Shippers Ins. Co. 84 NYS2d 637, aff'd 95 NYS2d 543.)
>
> "Such a right can only exist where equity demands its exercise. To allow it in the present case would, in effect, be to compel the insured to pay a premium without insurance, and to permit the insurer to exact a premium without risk." (Kernochan v N.Y. Bowery Ins. Co., 17 NY 436)

GEB was a beneficiary to receive the money from the policy purchased by the mortgagor. Steven the mortgagor paid a premium, was entitled to the benefit of having his mortgage paid and discharged. FATIC had no subrogation right (See (Palisano v Banbkers & Shippers Ins. Co. 84 NYS2d 637, aff'd 95 NYS2d 543; Hessian Hills Country Club v Home Ins. Co. 262 NY 189; (In Re SPG of Schenectady, Inc. 833 F. 2d 413). To do otherwise would be to allow the insurer to exact a premium from a mortgagor for an insurance that might not cover him and for which he would receive no benefit.

FATIC's $195,000 to GEB was in effect a payment on a policy purchased by the mortgagor to cover a risk not excluded and to relieve the mortgaged premises of the lien, it did not qualify as an "assignment" by FATIC's hollow claim that it had "purchased" the mortgage. Where the insurance is effected at the mortgagor's expense, the **proceeds apply towards reduction of**

the debt. (Norwich Fire Ins. Co. v Boomer, 4 Am. rep. 618; Adams v Allen, 19 So. 2d 578; Concord Union Mut. v Woodbury, 45 Me 447; Hartford Fire v Bleedorn, 132 S.W. 2d 1066; Leyden v Lawrence, 81 A. 121; Pheonix Assur. Co. v Allison, 17 S.W. 894.) It is illuminated in 78 NY Jur 2d, Mortgage, Sec. 325, that

> "Wherever a given transaction will be held, in legal effect, to operate as a payment and discharge, which extinguishes the mortgage, or as an assignment which preserves and keep it on foot, does not depend so much on the form of the words used as upon the relations subsisting between the parties advancing the money and the party executing the transfer or release, and their relative duties....If the money is advanced by one whose duty it is, by contract or otherwise to pay and cancel the mortgage, and to relieve the mortgaged premises of the lien, a duty in the proper performance of which others have an interest, the transaction will be held to be a release, and not an assignment, even though in form it purports to be an assignment (Merten v Wakefield 71 NYS 1062, 35 Misc 501.)"

Contrary to the Queens district court's decree, a buyer of the title insurance policy had the right to rely on the insurer, regardless of the fact that the buyer is not the beneficiary. A court discerningly termed the title insurer's money paid to insured **did not purchase note and mortgage** but rather merely satisfied its obligation under its title policy. (American Title Insurance Co. v M-H Enterprises, 815 P.2d 1219). Insurer's rights against the buyer of insurance are non-existent. There was no agreement stating otherwise in this policy.

Furthermore, Knowlton v Black, 1907, 102 Me 503, 67 A. 563 is applied here, "If the mortgagee accepted a smaller amount in full discharge of the mortgage debt, the mortgagor is fully released from further liability." Since Steven was to be

released from further liability, I should not be required to pay for Steven's share of the LISB mortgage. If the delinquent title insurer could only demand for me to pay a half of the LISB lien with correct interest, not the $225,000, I could have managed.

CONCLUSION

As both GEB and FATIC's claims in making me liable and their subrogation rights were contested, a foreclosure sale should not be allowed before there was a trial where I would have a full, fair and meaning opportunity to defend. Even if Steven was too ignorant and did not wish to spend money to contest his right, there was a "privity of estate" between me and the GEB/FATIC who intruded into my property and contractual rights and caused me great financial and mental suffering, my defenses should preclude plaintiff's claim to sell off my property.

In consideration of the above stated reasons, I pray that the petition for Writ of Certiorari be granted.

Respectfully submitted,

JANET CHANG,
Pro se Petitioner
947 Fox Meadow Road
Yorktown, NY 10598
(914) 245-9690

APPENDIX A - COURT OF APPEALS ORDER DENYING MOTION FOR REHEARING AND FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Twentieth of December, 1999

Present, Hon. Judith S. Kays, Chief Judge, presiding

2-11 Mo. No. 171
First American Title Insurance Co. Of New York

Respondent,

V.

Steven H. Chang,
Defendant

Janet Chang, Appellant.

A motion for reargument of motion for leave to appeal to the court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

STUART M. COHEN
Clerk of the Court

APPENDIX B - COURT OF APPEALS ORDER DENYING MOTION FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Twenty-ninth of February, 2000

Present, Hon. Judith S. Kays, Chief Judge, presiding

2-11 Mo. No. 171
First American Title Insurance Co. Of New York

Respondent,

V.

Steven H. Chang,
Defendant

Janet Chang, Appellant.

A motion for leave to appeal to the court of Appeals in the above cause having heretofore been made upon the part of the appellant herein, and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

STUART M. COHEN
Clerk of the Court

APPENDIX C: N.Y. STATE SUPREME COURT, APPELLATE DIVISION, SECOND DEPT., DISMISSING THE APPEAL AND DENYING REVIEW OF LOWER COURT FINAL JUDGMENT OF FORECLOSURE AND SALE (THE COURT LAST ADDRESSED THE MERITS OF THE CASE)

GUY JAMES MANGANO, P.J.
CORNELIUS J. O'BRIEN
THOMAS R. SULLIVAN
GLORIA GOLDSTEIN, JJ

98-10381
First American Title Insurance Co. of New York,

Respondent

-against-

Steven Chang, Defendant
and
Janet Chang, appellant

Motion by the appellant pro se to enlarge the time to perfect an appeal from a judgement of the Supreme Court. Queens County, dated September 10, 1998.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied: and it is further.

ORDERED that on the court's own motion, the appeal is dismissed without costs or disbursements for failure to timely perfect the same.

MANGANO, P.J., O'BRIEN, SULLIVAN, and GOLDSTEIN, JJ.. concur.

ENTERED:

MARTIN H. BROWNSTEIN
Clerk

DATED: June 20, 1999

APPENDIX D - N.Y. STATE SUPREME COURT, QUEENS COUNTY FINAL JUDGMENT OF FORECLOSURE AND SALE

First American Title Insurance Co. of New York,

Plaintiff

-against-

Steven Chang, Janet Chang, et al
Defendant

This is a motion by the plaintiff in a foreclosure action for summary judgement, appointment of a referee to compute, and related relief. A cross-motion by the defendant Janet Chang to consolidate this action with a related action for the partition of the property has been withdrawn.

The defendant, Janet Chang, succeeded to her husband's one-half undivided interest in the premises which are the subject of this action upon the death of her husband, Hsu Chang. The remaining on-half undivided interest was and is owned by Hsu Chang's brother, Steven H. Chang. At the time of Hsu Chang's death, the property was encumbered by a mortgage loan owed to the Long Island Savings Bank. On February 9, 1987, the plaintiff loaned to Steven H. Chang the sum of two hundred fifty thousand dollars ($250,000). The loan was secured by a mortgage on the entire property. As noted, Steven H. Chang owned only a one-half interest in the property, Janet Chang, the owner of the other half, did not consent to the mortgage. At the closing on the mortgage, the plaintiff paid off the outstanding loan to the Long Island Savings Bank out of the proceeds of its loan to Steven H. Chang. The amount paid was eighty five thousand one hundred thirty-eight dollars and thirty cents

($85,138.30). Steven H. Chang has not paid the sum due on the loan by the plaintiff, and this action followed.

Plaintiff claims foreclosure not only as to the entirety of Steven H. Chang's interest, but also as to Janet Chang's interest, to the extent of the prior mortgage to the Long Island Savings Bank. As to this, it claims entitlement under the doctrine of equitable subrogation. In King v Pelkorski, 20 NY2d 326, the Court of Appeals adopted the formulation of the Restatement, Restitution Sec. 162, that "where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder."

Here, the mortgage to the Long Island Savings Bank was a lien on Janet Chang's interest in the premises. This lien was discharged using the plaintiff's money. In the court's opinion, it would be unjust to allow Janet Chang to retain the entire value of her interest, after the property is sold in foreclosure, free and clear of any obligation to repay that mortgage. Therefore, the court holds that the doctrine of equitable subrogation applied here, and Janet Chang's interest in the premises is available to satisfy the equitable lien created by the plaintiff's repayment of the Long Island Savings Bank mortgage.

It must be emphasized however, that the plaintiff contends that the equitable lien is a first mortgage and the later loan is a second mortgage. Therefore, the interests in the property owned by Steven H. Chang and Janet Chang shall contribute equally to the repayment of the $85,138.30 which the plaintiff paid to the Long Island Savings Bank. Only after that is paid, shall the second mortgage by Steven H. Chang be paid, out of the reminder of his interest.

The plaintiff's motion is granted, the answer defense and counterclaims asserted by the defendant Janet Chang are stricken, and the plaintiff shall have summary judgement on its first and second cause of action. A referee shall be appointed to compute the amount due as set forth above.

Settle order.

ARTHUR W. LONSCHIEN
J.S.C.